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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 235

EDWARD F. FLYNN, AS EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT AND BRIEF IN SUPPORT THEREOF.

THOMAS R. FITZSIMMONS,
Counsel for Petitioner.
WILLIAM A. BREE,
WILLIAM F. GEENTY,
Of Counsel.

(35,157)

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THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Edward F. Flynn, as executor of the estate of Edward L. Flynn, deceased, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

On December 4, 1923, Edward L. Flynn, since deceased, was employed by The New York, New Haven and Hartford Railroad Company as a foreman of car-

penters at their Cedar Hill Yards, located in the town and county of New Haven and State of Connecticut (R. 1-2).

On that date Edward L. Flynn and The New York, New Haven and Hartford Railroad Company were engaged in interstate commerce, and while they were so engaged Edward L. Flynn, due to the negligence of other employees of The New York, New Haven and Hartford Railroad Company was seriously injured, and as a result of his injuries, after having lingered for a long period of time, died on September 1, 1928 (R. 1-2).

Edward L. Flynn at the time of his death left him surviving a widow and eight children, who were dependent upon him; and as a result of his death they suffered pecuniary loss (R. 2-3).

Edward F. Flynn, the petitioner, a son of Edward L. Flynn, deceased, was thereafter duly appointed executor of the estate of Edward L. Flynn, deceased, by the Probate Court for the district of New Haven, said court having jurisdiction over the estate of Edward L. Flynn, and the petitioner has duly qualified and is acting as such (R. 3).

Edward L. Flynn during his lifetime brought no cause of action for his injuries which were due to the negligence of the servants and employees of The New York, New Haven and Hartford Railroad Company; nor was his right of action for said injuries adjudicated, compromised, or released in any manner.

By writ, complaint, and summons, dated May 15, 1929—that is, within nine months from the death of

Edward L. Flynn—the petitioner brought an action in the Superior Court for New Haven County, within the State of Connecticut, returnable on the first Tuesday of June, 1929, for the pecuniary loss sustained by the widow and children of the deceased, and said writ, complaint, and summons was, on that date, duly served upon the respondent. This action was brought under the Federal Employers' Liability Act, which is the act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65 (R. 3).

The facts are not in dispute. The manner in which the questions involved were raised in this case was by a demurrer of the respondent to the writ, complaint, and summons of the petitioner (R. 3-4). The case was heard by the Superior Court for the County of New Haven without evidence and upon undisputed facts. A memorandum of decision on demurrer was filed on July 11, 1929, by the Honorable Arthur F. Ells, Judge of the Superior Court, sustaining the demurrer of the respondent. The petitioner refused to plead further and on September 27, 1929, judgment was rendered without opinion in favor of the respondent by Honorable Christopher L. Avery, Judge of the Superior Court (R. 7), from which judgment an appeal was taken to the Supreme Court of Errors. From its judgment the within petition for a writ of certiorari is pursued. There is now respectfully submitted to this Court a number of questions of law.

B.

Reasons Relied on for the Allowance of the Writ.

The special and important reasons for the granting of a review of the within writ of certiorari are:

I. That the Supreme Court of Errors of the State of Connecticut has decided a Federal question of substance not heretofore determined by this Court, but should be settled by this Court on a hearing on the merits (Rule 38, Sec. 5 (*a*)).

II. That the Supreme Court of Errors of the State of Connecticut has decided an important Federal question of substance in a way which is not in accord with applicable decisions of this Court (Rule 38, Sec. 5 (*a*)).

(A) Reasons Nos. I and II present the following important claims:

That the statute of limitations begins to run against an action by the dependents of a deceased employee for the pecuniary loss sustained by them due to the death of said employee from the time of death.

Reading Co. *vs.* Koons, 271 U. S. 58.
Chicago, Burlington & Quincy R. R. *vs.* Wells-Dickey Trust Co., 275 U. S. 161.

(B) Reasons Nos. I and II present the following important claims:

That the Federal Employers' Liability Act does not, in express terms, make the personal

representative's right to maintain an action dependent upon the existence of a right of action in the decendent immediately before he dies, and that the gist of the Federal Employers' Liability Act is that in all cases there shall be but one recovery for the wrongful acts and that the dependents' right of action shall not be barred unless the deceased had received satisfaction in his lifetime either by settlement and adjustment or by adjudication in the courts.

Seaboard Airline Ry. *vs.* Oliver, 261 Fed. 1.

Mellon *vs.* Goodyear, 277 U. S. 335.

(C) REASONS NOS. I AND II PRESENT THE FOLLOWING IMPORTANT CLAIMS:

That the Federal Employers' Liability Act declares two distinct and independent liabilities resting upon the common foundation of a wrongful injury and based upon altogether different principles.

Michigan Central R. R. Co. *vs.* Vreeland, 227 U. S. 59.

St. Louis & Iron Mountain R. R. *vs.* Craft, 237 U. S. 648.

American Railroad *vs.* Didrichson, 227 U. S. 145, 149.

Taylor *vs.* Taylor, 232 U. S. 363,370.

(D) REASONS NOS. I AND II PRESENT THE FOLLOWING IMPORTANT CLAIMS:

That this Court has never had before it the point of law involved in this case arising under the Federal Employers' Liability Act and, therefore, this Court should take jurisdiction so that the point may be finally determined.

The foregoing questions and claims set out under Reasons I and II, the petitioner respectfully represents, were erroneously determined by the courts below, and your petitioner has no other relief or adequate remedy than that of securing a writ of certiorari from this Court. Without that relief, the petitioner is without redress.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Errors of the State of Connecticut and commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 30607, Edward F. Flynn, executor of the estate of Edward L. Flynn, appellant, *vs.* The New York, New Haven and Hartford Railroad Company, appellee, and that said judgment of the Supreme Court of Errors of the State of Connecticut may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in

the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

EDWARD F. FLYNN, AS EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED.

By THOMAS R. FITZSIMMONS,
Counsel for Petitioner.

WILLIAM A. BREE,
WILLIAM F. GEENTY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

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vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion in the Supreme Court of Errors for the State of Connecticut is reported in Edward F. Flynn, as executor of the estate of Edward L. Flynn, deceased, vs. The New York, New Haven and Hartford Railroad Company, 149 Atlantic Reporter 682; Ad-

vance Sheet No. 7, May 3, 1930; 111 Connecticut Reports, Advance Sheet No. 3, May, 1930.

The opinion is printed on pages 9 to 14 of the record.

II.

Jurisdiction.

1. The statutory provisions believed to sustain the jurisdiction of this Court, as required by Rule 12, par. 1, and Rule 27, par. 2, "*c*", is as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding

paragraph nor shall the fact that a review on writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Judicial Code, Section 237 (*b*), as amended by the Act of February 13, 1925; 43 Stat. 937.

2. The date of judgment to be reviewed is March 31, 1930 (R. 14).

3. The nature of the case: a suit under the Federal Employers' Liability Act against an interstate carrier (R. 1-3).

Federal Employers' Liability Act, Act of April 22, 1908, c. 149, Sec. 1; 35 Stat. 65.

and the nature of the rulings below (R. 9-14) (Petition, pages 4, 5) (Rule 38, Sec. 5 (*a*)) were such as to bring the case within the jurisdictional provision relied on, as required by Rule 12, par. 1, Rule 27, par. 2 (*c*).

4. Cases believed to sustain the jurisdiction of this Court, as required by Rule 27, par. 2 (*c*), are:

Chicago, Rock Island & Pacific Ry. Co. *vs.* Devine, 239 U. S. 52.

Talbot *vs.* Sioux City First National Bank, 185 U. S. 172.

III.

Statement of the Case.

A full statement of the case has been given under heading "A" in the petition for writ of certiorari

and, in the interest of brevity, it is deemed wise not to repeat it at this point.

IV.

Specifications of Errors.

1. The Supreme Court of Errors of the State of Connecticut erred in not holding that the statute of limitations, under the Federal Employers' Liability Act, begins to run against the action by the dependents of a deceased employee, for the pecuniary loss sustained by them due to the employee's death, from the time of the death, and that no cause of action vests in such dependents until the death.

2. The Supreme Court of Errors of the State of Connecticut erred in not holding that there is a distinction where an injured employee, during his lifetime, extinguishes his right of action by settlement, compromise, or adjudication, thereby extinguishing the right of action in his dependents, as the one recovery, as limited by the Act, has been had; and where the decedent, due to laxity or lapse of time, fails to bring his cause of action within two years of the date of the injury and dies without ever having received any compensation as provided for under the Federal Employers' Liability Act.

3. The Supreme Court of Errors of the State of Connecticut erred in not holding that the Federal Employers' Liability Act declares two distinct and independent liabilities resting upon the common foundation of a wrongful injury, but based upon altogether

different principles, and that cause of action, created for the benefit of the dependents of a deceased employee, is one beyond that which the decedent had.

4. That the Supreme Court of Errors of the State of Connecticut erred in sustaining the respondent's demurrer to the petitioner's complaint.

V.

ARGUMENT.

Summary of the Argument.

Point A. The statute of limitations begins to run against an action by the dependents of a deceased employee, under the Federal Employers' Liability Act, for the pecuniary loss sustained by them due to the death of said employee, from the time of his death.

Point B. The Federal Employers Liability Act does not, in express terms, make the personal representative's right to maintain an action dependent upon the existence of a right of action in the decedent immediately before he dies, and that the gist of the Federal Employers' Liability Act is that in all cases there shall be but one recovery for the wrongful acts, and that the dependents' right of action shall not be barred unless the deceased had received satisfaction in his lifetime either by settlement and adjustment or by adjudication in the courts.

Point C. The Federal Employers' Liability Act declares two distinct and independent liabilities resting

upon the common foundation of a wrongful injury and based upon altogether different principles.

Point D. This Court has never had before it the point of law involved in this case arising under the Federal Employers' Liability Act and, therefore, this Court should take jurisdiction so that the point may be finally determined.

Point E. That the Supreme Court of Errors of the State of Connecticut erred in sustaining the respondent's demurrer to the petitioner's complaint.

POINT A.

The statute of limitations begins to run against an action by the dependents of a deceased employee, under the Federal Employers' Liability Act, for the pecuniary loss sustained by them due to the death of said employee, from the time of his death.

It is conceded and an undisputed fact that Edward L. Flynn was injured on December 4, 1923, and that he died on September 1, 1928, and within nine months from the date of his death this action was brought by the petitioner. The Federal Employers' Liability Act provides that "no cause of action shall be maintained under this chapter unless commenced within two (2) years from the day the cause of action accrued."

Act of April 22, 1903, c. 149, Sec. 6, 35. Stat. 65, as amended by the Act of April 5, 1910, c. 143, Sec. 1, 36; — Stat. 291.

There can be no question about it but that the dependents of the deceased employee, Edward L. Flynn,

had no cause of action nor any standing in court, nor did any cause of action become vested in them until September 1, 1928, *i. e.*, the date of Edward L. Flynn's death. There was no way in which these dependents, through the petitioner, could start their cause of action given them under the provisions of the Federal Employers' Liability Act until the employee had died. As a matter of fact, they had no cause of action until the event, the death of Edward L. Flynn, occurred. When the event which gave them their cause of action, *i. e.*, the death of Edward L. Flynn, occurred, the petitioner commenced this action in good season.

This Court has held that "every practical consideration which would lead to the imposition of any period of limitation would require that the period should begin to run from the definitely ascertained time of death rather than the uncertain time of the appointment of an administrator."

Reading Company *vs.* Koons, admr., 271 U. S. 58.

And this Court in a later case held that "the cause of action accrues after death. When it accrues, there is an immediate, final, and absolute vesting; and the vesting is in that one of several possible beneficiaries who, according to the express provisions in the statute, is declared entitled to be compensated."

Chicago, Burlington & Quincy R. R. *vs.* Wells-Dickey Trust Co., 275 U. S. 161.

This is the only reasonable and sensible rule which can be applied in these cases arising under the Federal

Employers' Liability Act. The cause of action given to the dependents of employee is for the pecuniary loss sustained by reason of the employee's death. The cause of action does not arise until the employee dies, and surely the time within which the action must be brought cannot begin to be computed until the cause of action arises.

POINT B.

The Federal Employers' Liability Act does not, in express terms, make the personal representative's right to maintain an action dependent upon the existence of a right of action in the decedent immediately before he dies, and that the gist of the Federal Employers' Liability Act is that in all cases there shall be but one recovery for the wrongful acts, and that the dependents' right of action shall not be barred unless the deceased had received satisfaction in his lifetime either by settlement and adjustment or by adjudication in the courts.

It is admitted that Edward L. Flynn, the deceased employee in this case, did not settle or release his claim for damages for the injuries he received on December 4, 1923, nor did he bring suit, nor was any adjudication or satisfaction had by him at any time during his lifetime. We therefore have in this case an admitted wrongful and negligent act for which no recovery has been had by the employee or his dependents under the Federal Employers' Liability Act.

It has been decided by this Court that where an employee has been injured, and during his lifetime has

either released or settled his cause of action with the carrier, or his right of action has been adjudicated or satisfied, the cause of action of the dependents of such an employee is barred. And this is reasonable and clear as the one recovery as provided for by the Act has been had, and the entire field of law on this particular subject is very thoroughly gone into in this same case.

Mellon *vs.* Goodyear, 277 U. S. 335.

But there is a distinction in the case at bar and the case of Mellon *vs.* Goodyear, *supra.* In the case at bar, there never has been a release, settlement, adjustment or adjudication of the cause of action which has vested in the decedent, Edward L. Flynn, and no recovery has been had by him during his lifetime, nor has any recovery been had by his dependents. True at the time of Edward L. Flynn's death he had no cause of action, but this was not due to an affirmative extinguishment of his right, but due to lapse of time, or a passive extinguishment, which was an extinguishment of his right of action alone. The right of action of the dependents was in no way affected by the extinguishment of his right, as it was not existent until the death of Edward L. Flynn. There is a great distinction where the cause of action of the employee is affirmatively extinguished and where it is extinguished by mere lapse of time as affecting the dependents' cause of action. This distinction is pointed out in a case decided by the Circuit Court of Appeals for the Fifth Circuit, and that part of its opinion was cited by this

Court in Mellon *vs.* Goodyear, *supra.* The Circuit Court of Appeals said:

> "The Federal Employers' Liability differs from Lord Campbell's Act and other similar statutes in that the former does not, in terms, make the personal representatives' right to maintain an action dependent upon the existence of a right of action in the decedent immediately before he dies."
>
> "The defendant in error's lack of right to maintain his suit in such a situation as the one under consideration is due, not to the decedent's lack, immediately prior to his death, of an enforceable right of action for the injury he sustained, but to the fact that the cause of action counted on has been extinguished by payment of the judgment recovered by the decedent for the wrong he suffered."
>
> Seaboard Air Line Ry. Co. *vs.* Oliver, 261 Fed. 1.

POINT C.

The Federal Employers' Liability Act declares two distinct and independent liabilities resting upon the common foundation of a wrongful injury, and based upon altogether different principles.

This Court has repeatedly held, in a number of cases, that the Federal Employers' Liability Act declares two distinct and independent liabilities founded on the common wrongful injury, but based upon altogether different principles. The cause of action created for the benefit of the dependents of an em-

ployee who dies as a result of his injuries is not a representative right, but a separate and distinct right which is vested in certain designated dependents. The cause of action in the dependents is independent of any cause of action which the deceased employee had, and it includes no damages which the employee might have recovered in an action brought by him during his lifetime. It is a liability for the loss and damage sustained by the relatives dependent upon the decedent. As this Court said:

> "The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death."
>
> Michigan Central Railroad Co. *vs.* Vreeland, 227 U. S. 59.

To show more conclusively that the Act declares two distinct and independent causes of action, this Court, in a case which was decided after Michigan Central Railroad Company *vs.* Vreeland, *supra,* in construing the Act as amended by the Act of April 5, 1910, 36 Stat. 291, c. 143, went further. In that case, the administrator claimed damages on account of the pecuniary loss to the father; and also damages for the conscious pain and suffering by the decedent. This Court permitted a recovery on both claims and said:

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and

is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

St. Louis & Iron Mountain Ry. Co. *vs.* Craft, 237 U. S. 648.

And this rule is again laid in another case decided by this Court, in which the entire filed of the law on this subject is very thoroughly considered.

Mellon *vs.* Goodyear, 277 U. S. 335.

A case which was before the House of Lords in England in which a statute similar to the Federal Employers' Liability Act, and in which the exact question that is presented by this case at bar was decided, might be of help. In that case the House of Lords held:

"The Code ignores the representatives of the injured person, and gives a direct right of action to his widow and relations." "These parties are to have an indpendent and not a representative right." * * *

"The prescription established by Sec. 2262 (2) had cut off the deceased's right of action * * * * but the Code does not make it a condition of the right of action given to the appellant by Sec. 1056 that her husband's claim shall not have prescribed. That prescription is not, within the meaning of the Code, equivalent to indemnity or satisfaction is made perfectly clear by reference to Sec. 1138, which enum-

erated the various ways in which an obligation may be extinguished.

Law Reports—Appeal Cases (1892), page 481 (English).

POINT D.

This Court has never had before it the point of law involved in this case arising under the Federal Employers' Liability Act and therefore this Court should take jurisdiction so that the point may be finally determined.

This Court has never had before it for decision the point of law in question in this case, *i. e.*, where an employee dies more than two years after he has been injured without having released, settled, or compromised his claim, or having his claim adjudicated in the courts during his lifetime; whether or not the statute of limitations has run against the action of the dependents, or whether or not the action of the dependents is barred by reason of the statute of limitations having run against the decedent's cause of action before his death.

POINT E.

That the Supreme Court of Errors of the State of Connecticut erred in sustaining the respondent's demurrer to the petitioner's complaint.

The reasons why the Supreme Court of Errors should not have sustained the respondent's demurrer to the petitioner's writ, summons, and complaint have been necessarily included in Points A, B, and C of this

argument, and therefore, in the interest of brevity, it will not be treated here.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its Supervisory powers, in order that the errors of the Supreme Court of Errors for the State of Connecticut be corrected and reversed, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Errors for the State of Connecticut and finally reverse it.

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